

Chapter 23b

Access to Electronic Communications

77-23b-1 Definitions.

- (1) As used in this chapter, "remote computing service" means provision to the public of computer storage or processing services by means of an electronic communications system.
- (2) The definitions of terms in Section 77-23a-3 apply to this chapter.

Amended by Chapter 122, 1989 General Session

77-23b-2 Interference with access to stored communication -- Offenses -- Penalties.

- (1) Except under Subsection (3), a person who obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in the system shall be punished under Subsection (2) if he:
 - (a) intentionally accesses without authorization a facility through which an electronic communications service is provided; or
 - (b) intentionally exceeds an authorization to access that facility.
- (2) A person who commits a violation of Subsection (1) is:
 - (a) if the offense is committed for purposes of commercial advantage, malicious destruction, or damage, or private commercial gain, guilty of a:
 - (i) third degree felony for the first offense under this subsection; and
 - (ii) second degree felony for any subsequent offense; and
 - (b) class B misdemeanor in any other case.
- (3) Subsection (1) does not apply to conduct authorized:
 - (a) by the person or entity providing a wire or electronic communications service;
 - (b) by a user of that service with respect to a communication of or intended for that user; or
 - (c) under Sections 77-23a-10, 77-23b-4, and 77-23b-5.

Amended by Chapter 241, 1991 General Session

77-23b-3 Revealing stored electronic communication -- Prohibitions -- Penalties.

- (1) Except under Subsection (2):
 - (a) the person or entity providing an electronic communications service to the public may not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service; and
 - (b) a person or entity providing a remote computing service to the public may not knowingly divulge to any person or entity the contents of any communication that is carried or maintained on that service:
 - (i) on behalf of and received by means of electronic transmission from or created by means of computer processing of communications received by means of electronic transmission from a subscriber or customer of the service; and
 - (ii) solely for the purpose of providing storage or computer processing services to the subscriber or customer, if the provider is not authorized to access the contents of any communications for the purpose of providing any services other than storage or computer processing.
- (2) A person or entity may divulge the contents of a communication:

- (a) to an addressee or intended recipient of the communication or an agent of the addressee or intended recipient;
- (b) as otherwise authorized under Section 77-23a-4, 77-23a-8, or 77-23b-4;
- (c) with the lawful consent of the originator or addressee or intended recipient of the communication, or the subscriber in the case of remote computing service;
- (d) to a person employed or authorized, or whose facilities are used to forward the communication to its destination;
- (e) as may be necessarily incident to the rendition of the service or the protection of the rights or property of the provider of that service; or
- (f) to a law enforcement agency, if the contents:
 - (i) were inadvertently obtained by the service provider; and
 - (ii) appear to pertain to the commission of a criminal offense.

Amended by Chapter 122, 1989 General Session

77-23b-4 Disclosure by a provider -- Grounds for requiring disclosure -- Court order.

- (1) A government entity may only require the disclosure by a provider of electronic communication services of the contents of an electronic communication that is in electronic storage in an electronic communication system pursuant to a warrant issued under the Utah Rules of Criminal Procedure or an equivalent federal warrant.
- (2) Subsection (1) applies to any electronic communication that is held or maintained on that service:
 - (a) on behalf of and received by means of electronic transmission from or created by means of computer processing of communications received by means of electronic transmission from a subscriber or customer of the remote computing service; and
 - (b) solely for the purpose of providing storage or computer processing services to the subscriber or customer, if the provider is not authorized to access the contents of any communication for purposes of providing any services other than storage or computer processing.
- (3)
 - (a)
 - (i) Except under Subsection (3)(a)(ii), a provider of electronic communication services or remote computing services may disclose a record or other information pertaining to a subscriber to or customer of the service, not including the contents of communication covered by Subsection (1), to any person other than a governmental agency.
 - (ii) A provider of electronic communication services or remote computing services shall disclose a record or other information pertaining to a subscriber to or customer of the service, not including the contents of communication covered by Subsection (1), to a governmental entity only when the entity:
 - (A) uses an administrative subpoena authorized by a state or federal statute or a state or federal grand jury subpoena;
 - (B) obtains a warrant issued under the Utah Rules of Criminal Procedure or an equivalent federal warrant;
 - (C) obtains a court order for the disclosure under Subsection (4); or
 - (D) has the consent of the subscriber or customer to the disclosure.
 - (b) A governmental entity receiving records or information under this subsection is not required to provide notice to a subscriber or customer.
- (4)

- (a) A court order for disclosure under this section may be issued only if the governmental entity shows there is reason to believe the contents of a wire or electronic communication, or the records or other information sought, are relevant to a legitimate law enforcement inquiry.
- (b) A court issuing an order under this section, on a motion made promptly by the service provider, may quash or modify the order, if the information or records requested are unusually voluminous in nature or compliance with the order otherwise would cause an undue burden on the provider.
- (5) A cause of action may not be brought in any court against any provider of wire or electronic communications services, its officers, employees, agents, or other specified persons, for providing information, facilities, or assistance in accordance with the terms of a court order, warrant, subpoena, or certification under this chapter.

Amended by Chapter 115, 2012 General Session

77-23b-5 Backup copy of communications -- When required of provider -- Court order -- Procedures.

- (1)
 - (a) A governmental entity acting under Subsection 77-23b-4(2)(b) may include in its subpoena or court order a requirement that the service provider to whom the request is directed create a backup copy of the contents of the electronic communications sought in order to preserve those communications. Without notifying the subscriber or customer of the subpoena or court order, the service provider shall create the backup as soon as practicable, consistent with its regular business practices. The provider shall also confirm to the governmental entity that the backup copy has been made. The backup copy shall be created within two business days after receipt by the service provider of the subpoena or court order.
 - (b) Notice to the subscriber or customer shall be made by the governmental entity within three days after receipt of confirmation, unless the notice is delayed under Subsection 77-23b-6(1).
 - (c) The service provider may not destroy the backup copy until the later of:
 - (i) the delivery of the information; or
 - (ii) the resolution of any proceedings, including appeals of any proceeding, concerning the government's subpoena or court order.
 - (d) The service provider shall release the backup copy to the requesting governmental entity no sooner than 14 days after the governmental entity's notice to the subscriber or customer, if the service provider:
 - (i) has not received notice from the subscriber or customer that the subscriber or customer has challenged the governmental entity's request; and
 - (ii) has not initiated proceedings to challenge the request of the governmental entity.
 - (e) A governmental entity may seek to require the creation of a backup copy under Subsection (1)(a) if in its sole discretion the entity determines that there is reason to believe that notification under Section 77-23b-4 of the existence of the subpoena or court order may result in destruction of or tampering with evidence. This determination is not subject to challenge by the subscriber, customer, or service provider.
- (2)
 - (a) Within 14 days after notice by the governmental entity to the subscriber or customer under Subsection (1)(b), the subscriber or customer may file a motion to quash the subpoena or vacate the court order, with copies served upon the governmental entity, and with written notice of the challenge to the service provider. A motion to vacate a court order shall be filed in the court that issues the order. A motion to quash a subpoena shall be filed in the

appropriate district court. The motion or application shall contain an affidavit or sworn statement:

- (i) that the applicant is a customer or subscriber to the service from which the contents of electronic communications maintained for him have been sought; and
 - (ii) that the applicant's reason for believing the records sought are not relevant to a legitimate law enforcement inquiry or that there has not been substantial compliance with the provisions of this chapter in some other respect.
- (b) Service shall be made under this section upon a governmental entity by delivering or mailing by registered or certified mail a copy of the papers to the person, office, or department specified in the notice the customer received under this chapter. For purposes of this subsection, "deliver" has the same meaning as under the Utah Rules of Criminal Procedure.
- (c) If the court finds that the customer has complied with Subsections (2)(a) and (b), the court shall order the governmental entity to file a sworn response, that may be filed in camera if the governmental entity includes in its response the reasons making in camera review appropriate. If the court is unable to determine the motion or application on the basis of the parties' initial allegations and response, the court may conduct additional proceedings as it considers appropriate. All proceedings shall be completed, and the motion or application decided, as soon as practicable after the filing of the governmental entity's response.
- (d) If the court finds that the applicant is not the subscriber or customer for whom the communications sought by the governmental entity are maintained, or that there is a reason to believe that the law enforcement inquiry is legitimate and that the communications sought are relevant to that inquiry, it shall deny the motion or application and order the process enforced. If the court finds that the applicant is the subscriber or customer for whom the communications sought by the governmental entity are maintained, and that there is no reason to believe that the communications sought are relevant to a legitimate law enforcement inquiry, or that there has not been substantial compliance with this chapter, it shall order the process quashed.
- (e) A court order denying a motion or application under this section is not considered a final order, and no interlocutory appeal may be taken from it by the customer or subscriber.

Enacted by Chapter 251, 1988 General Session

77-23b-6 Notifying subscriber or customer of court order -- Requested delay -- Grounds -- Limits.

- (1)
- (a) The governmental entity acting under Section 77-23b-4 may:
 - (i) if a court order is sought, include in the application a request for an order delaying notification to the subscriber for not to exceed 90 days and, if the court determines there is reason to believe that notification of existence of the court order may have an adverse result, the court shall grant the order; or
 - (ii) if an administrative subpoena authorized by a state or federal statute or a state or federal grand jury subpoena is obtained, delay notification to the subscriber for not to exceed 90 days, upon the execution of a written certification of a supervisory official that there is reason to believe that the notification of the existence of the subpoena may have an adverse result.
 - (b) An adverse result is:
 - (i) endangering the life or physical safety of an individual;
 - (ii) flight from prosecution;

- (iii) destruction of or tampering with evidence;
 - (iv) intimidation of potential witnesses; or
 - (v) otherwise seriously jeopardizing an investigation or unduly delaying a trial.
- (c) The governmental entity shall maintain a true copy of certification under Subsection (1)(a)(ii).
- (d) Extensions of the delay of notification under Section 77-23b-4 of up to 90 days each, may be granted by the court upon application, or by certification by a governmental entity, but only in accordance with Subsection (2).
- (e) On expiration of the period of delay of notification under Subsection (1)(a) or (d), the governmental entity shall serve upon, or deliver by registered or first class mail, to the customer or subscriber a copy of the process or request together with a notice:
- (i) stating with reasonable specificity the nature of the law enforcement inquiry; and
 - (ii) informing the customer or subscriber:
 - (A) that information maintained for the customer or subscriber by the service provider named in the process or request was supplied to or requested by that governmental authority and the date the supplying or request took place;
 - (B) that notification of the customer or subscriber was delayed;
 - (C) which governmental entity or court made the certification or determination pursuant to which that delay was made; and
 - (D) which provision of this chapter allows the delay.
- (f) As used in this subsection, "supervisory official" means the investigative agent in charge or assistant investigative agent in charge or an equivalent of an investigative agency's headquarters or regional office; a county sheriff or chief deputy sheriff, or police chief or assistant police chief; the officer in charge of an investigative task force or the assistant officer in charge; or the attorney general, an assistant attorney general, a county attorney or district attorney, a deputy county attorney or deputy district attorney, or the chief prosecuting attorney of any political subdivision of the state.
- (2) A governmental entity acting under Section 77-23b-4, when not required to notify the subscriber or customer, or to the extent that it may delay notice under Subsection (1), may apply to a court for an order commanding the provider of electronic communications service or remote computing service to whom a warrant, subpoena, or court order is directed, for a period of time the court considers appropriate, to not notify any other person of the existence of the warrant, subpoena, or court order. The court shall enter the order if it determines that there is reason to believe that notification of the existence of the warrant, subpoena, or court order will result in:
- (a) endangering the life or physical safety of an individual;
 - (b) flight from prosecution;
 - (c) destruction of or tampering with evidence;
 - (d) intimidation of potential witnesses; or
 - (e) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

Amended by Chapter 115, 2012 General Session

77-23b-7 Fee for services of provider of information.

- (1)
- (a) Except as otherwise provided in Subsection (3), a governmental entity obtaining the contents of communications, records, or other information under Section 77-23b-4 or 77-23b-5 shall pay to the person or entity assembling or providing the information a reimbursement fee for the costs reasonably necessary and directly incurred in searching for, assembling, reproducing, or otherwise providing the information.

- (b) The reimbursement costs shall include any costs due to the necessary disruption of normal operations of any electronic communications service or remote computing service in which the information may be stored.
- (2) The fee amount under Subsection (1) shall be mutually agreed upon by the governmental entity and the person or entity providing the information, or in the absence of agreement, shall be as determined by the court:
 - (a) that issued the order for production of the information; or
 - (b) before which a criminal prosecution relating to the information would be brought, if no court order was issued for production of the information.
- (3) The requirement of Subsection (1) does not apply to records or other information maintained by a communications common carrier that relate to telephone toll records and telephone listings obtained under Section 77-23b-4. However, the court may order a payment as described under Subsection (1) if the court determines the information required is unusually voluminous in nature or otherwise causes an undue burden on the provider.

Amended by Chapter 122, 1989 General Session

77-23b-8 Violation of chapter -- Civil action by provider or subscriber -- Good faith defense -- Limitation of action.

- (1) Except under Subsection 77-23b-4(5), any provider of electronic communications service, subscriber, or customer aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may in a civil action recover from the person or entity that engaged in that violation relief as is appropriate.
- (2) In a civil action under this section, appropriate relief includes:
 - (a) preliminary and other equitable or declaratory relief as is appropriate;
 - (b) damages under Subsection (3); and
 - (c) a reasonable attorney's fee and other litigation costs reasonably incurred.
- (3) The court may assess as damages in a civil action under this section the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case is a person entitled to recover less than \$1,000.
- (4) A good faith reliance on any of the following is a complete defense to any civil or criminal action brought under this chapter or any other law:
 - (a) a court warrant or order, a grand jury subpoena, legislative authorization, or a statutory authorization;
 - (b) a request of an investigative or law enforcement officer under Subsection 77-23a-10(7); or
 - (c) a good faith determination that Subsection 77-23a-4(9) permitted the conduct complained of.
- (5) A civil action under this section may not be commenced later than two years after the date the claimant first discovered or had a reasonable opportunity to discover the violation.

Amended by Chapter 22, 1989 General Session

Amended by Chapter 122, 1989 General Session

77-23b-9 Judicial scope of chapter remedies and sanctions.

The remedies and sanctions under this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter.

Enacted by Chapter 251, 1988 General Session

